STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KEYON LECEDRIC ROBERTSON,

Defendant-Appellant.

_____/

Supreme Court
No. 150132

Court of Appeals
No. 315870

Circuit Court
No. 2012-242361-FH

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT

This case arises from an order of dismissal signed by the Honorable Martha D. Anderson of the Oakland Circuit Court on April 8, 2013, following an April 3, 2013 Opinion and Order suppressing the physical evidence in this case. The Court of Appeals reversed and remanded in a unanimous unpublished per curiam opinion issued on August 21, 2014. Defendant filed his application for leave to appeal on September 24, 2014, and the People filed an answer on October 16, 2014.

On June 10, 2015, this Court entered an order scheduling this matter for argument on the application and directing the parties to file supplemental briefs, as follows:

> The parties shall file supplemental briefs within 42 days of the date of the order appointing counsel,[1] addressing whether the Court of Appeals erred by reversing the circuit court's orders granting the defendant's motion to suspend [sic] and dismiss the case. The parties should not submit mere restatements of their application papers. [*People v Robertson*, __Mich__ (2015).]

This Honorable Court has jurisdiction in this matter pursuant to MCL 600.215 and MCR 7.301(A)(2).

[1] The circuit court judge signed an order appointing counsel on June 16, 2015.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. **The record established that Defendant's actions, along with the other circumstances known to the officers, provided reasonable suspicion for an investigatory stop. The officers acted quickly to confirm or dispel their suspicion that Defendant was transporting narcotics, and probable cause to arrest Defendant was established based on a drug-sniffing dog's alert on Defendant's bag, Defendant's admission to smoking marijuana, and Defendant's presentation of a false identification card. Did the Court of Appeals correctly conclude that the circuit court erred in suppressing the evidence**?

The People answer, "yes."

Defendant answers, "no."

COUNTER-STATEMENT OF FACTS

Keyon Lecedric Robertson ("Defendant") was charged in this case with one count of Possession with Intent to Deliver 50 to 450 Grams of Heroin, contrary to MCL 333.7401(2)(a)(*iii*). Defendant was also charged in a companion case with other narcotics offenses arising out of a separate incident.[2] In the circuit court, Defendant filed a motion to suppress evidence uncovered during an investigatory stop and later search of his person that occurred on July 12, 2012. Following an evidentiary hearing, the circuit court granted the motion to suppress and later dismissed the case. The People appealed, and the Court of Appeals in a unanimous unpublished per curiam opinion reversed the circuit court's dismissal and suppression orders and remanded the case for reinstatement of the case. *People v Robertson*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 21, 2014 (Docket No. 315870).

Defendant sought leave to appeal before this Court. On June 10, 2015, the Court entered an order directing the clerk to schedule oral argument on the application and ordering the parties to file supplemental briefs addressing whether the Court of Appeals erred by reversing the circuit court's suppression and dismissal orders. *People v Robertson*, __ Mich __ (2015).

The Charged Incident:

Sergeant Sean Jennings of the Oakland County Sheriff's Office was the sergeant in charge of the East Side Crew, a street-level narcotics crew that was part of the Narcotics Enforcement Team ("NET").[3] (E, 20–21.)[4] Sgt. Jennings had been a sheriff's deputy for over

[2] Oakland Circuit Court Docket No. 2012-242359-FH. Specifically, Defendant was charged with Delivery/Manufacture of Less Than 50 Grams of Cocaine, contrary to MCL 333.7401(2)(a)(*iv*), and Possession of Marijuana (2nd or Subsequent Offense), contrary to MCL 333.7403(2)(d) and MCL 333.7413(2).

[3] NET is a multi-jurisdictional law enforcement narcotics task force.

[4] PE = Preliminary Examination Transcript, July 31, 2012; E = Evidentiary Hearing Transcript, Dec. 20, 2012; H = Hearing, Apr. 8, 2013.

twenty-one years and a sergeant for over six years. (E, 20.) He had worked with NET as a detective from 2000 to 2006, and he had been reassigned to the team as a sergeant in September 2011. (E, 20–21.) All told, he was going on eight years as a narcotics officer.[5] (E, 21.)

On July 12, 2012, Sgt. Jennings went to the Pontiac bus station after receiving a Crime Stoppers tip that a man named Leroy Jackson would be there to travel up north with some heroin. (E, 21–22.) The tip stated that Jackson would be there at about noon that day and that he would be taking a bus up north. (E, 23.) Before going to the station, Sgt. Jennings identified Jackson through a photo found on the Law Enforcement Information Network ("LEIN"). (E, 23.) The sergeant and some other officers then went to the bus station and set up surveillance. (E, 23–24.)

At some point, Sgt. Jennings was alerted by Deputy Curtis that Jackson had arrived at the bus station. (E, 24.) Jackson arrived at the bus station with another person, Defendant, who was not mentioned in the initial tip. (E, 24, 35.) Sgt. Jennings knew, however, that it was "very common" for narcotics traffickers to travel in pairs. (E, 32.) Jackson and Defendant arrived at the bus station, in the same vehicle, at about the time that the tip indicated Jackson would be there. (E, 24–25; PE, 7.) Sgt. Jennings learned that Jackson and Defendant were on the north side of the building. (E, 25.) Both men were standing outside as the officers approached, and Jackson turned when Sgt. Jennings yelled out "[H]ey Leroy." (E, 25.) The sergeant identified himself and asked Jackson for identification, which Jackson produced. (E, 25.) Jackson was arrested right away on an outstanding warrant and searched, but there were no drugs on him. (E, 25–27.)

[5] In this case, Sgt. Jennings was qualified as an expert in the area of narcotics trafficking without objection. (E, 22.) The sergeant had been qualified as an expert in the area of narcotics trafficking numerous times in the circuit court and various district courts in Oakland County. (E, 21.) He had received specialized training in that area through the Oakland Police Academy, in-service training with the Sheriff's Office, the Detroit basic police narcotics school, the Michigan State advanced narcotics school, and "numerous drug enforcement narcotics schools." (E, 21–22.) He had participated in "[h]undreds" of narcotics investigations. (E, 22.)

The officers then spoke to Defendant. (E, 25.) When asked what his destination was, Defendant, like Jackson, said that they were "going up north" toward St. Ignace. (E, 33.) Defendant took out an identification card bearing the name Kamone Dwayne Robertson and handed it to Sgt. Jennings. (E, 26.) The sergeant did not know who Defendant was, but he believed that the photo on the card was Defendant after looking at it. (E, 26, 34.) At this point, Sgt. Jennings "just noticed [Defendant] that – to appear to be real nervous, sweating, just – that – that feeling that an officer gets that, you know, something was wrong and he's kind of a good-sized person so for my safety I decided to put him – to restrain him and put him in handcuffs." (E, 28, 35.) In the sergeant's experience, it is common for people to become nervous when he makes contact with them. (E, 28–29.) However, on a scale of zero to ten, with zero being not nervous at all and ten being "the most nervous you've ever seen somebody," Defendant was at "about a seven." (E, 29.) The sergeant noted that Defendant was sweating and asked why he was nervous, and Defendant "just said it was hot outside." (E, 29.)

Sgt. Jennings asked both Defendant and Jackson if they had luggage with them, and they identified two pieces of luggage in the bus terminal as their bags. (E, 27.) He then alerted Deputy Curtis that the two bags were of interest. (E, 27.) Sgt. Jennings continued to talk to Defendant. (E, 36.) He also did "walk [Defendant] a short distance away" from the other officers and around a corner to separate Defendant from Jackson. (E, 37.)

Deputy David Curtis of the Oakland County Sheriff's Office was part of an undercover team. (E, 10–11.) He was also a member of the Oakland/Macomb Interdiction Team and served as a K-9 handler. (E, 11.) He had been a K-9 handler for 13 years and had worked with his current dog, Finn, for 8 years. (E, 11.) Deputy Curtis and Finn were certified "as a utility dog, which is narcotics, tracking, and aggressive work." (E, 11.) They maintain their certification

through weekly training, even though most departments only do such training monthly. (E, 11–12.) Finn is trained to detect cocaine, crack, marijuana, heroin, and meth. (E, 12–13.) Finn is an "aggressive active" dog, meaning that he "scratches or bites at the odor that [he is] trained to detect." (E, 13.) He only responds to odors. (E, 15.)

On July 12, Deputy Curtis and Finn attempted to determine if two pieces of luggage in the Pontiac bus station contained the odor of narcotics. (E, 13–14.) Deputy Curtis separated the bags from each other and retrieved Finn from outside. (E, 14.) He gave the command to sniff and quickly circled around each bag. (E, 14.) Finn alerted on both bags, which told Deputy Curtis "that the item either has narcotics inside or has the odor of narcotics on the outside or inside." (E, 14–15.) The bags were closed, and Deputy Curtis never opened them. (E, 15.)

The earlier Crime Stoppers tip that led the officers to the bus station involved heroin. (E, 22.) The odor detected also could have been caused by the bags sitting in "a room full of [m]arijuana" or if anyone had been smoking marijuana around them. (E, 17–18.) Finn was trained to detect the odor of either drug. (E, 12–13.) Deputy Curtis could tell that the odor was strong because Finn immediately indicated by snapping his head and digging into the two bags, but the deputy could not tell when the bags were exposed to whatever odor Finn had detected. (E, 18.) His experience told him "that this was a fresh odor." (E, 19.) No other sniffing was done. (E, 17.) Defendant was outside the waiting area during the sniff. (E, 15–16.) Deputy Curtis always makes sure that the person whose item(s) he is inspecting "is not standing behind me where they could get to me and I guess my own personal safety." (E, 16–17.)

After Finn alerted on the bags, they were searched. (E, 27.) No drugs were found. (E, 27.) Defendant was already detained and handcuffed at this time. (E, 27–28.) When Sgt. Jennings learned that no drugs were found in the bags, he asked Defendant why the dog might have

alerted on his bag. (E, 29.) Defendant admitted smoking marijuana earlier that day. (E, 29–30, 36.) Jackson also admitted that he and Defendant smoked marijuana "a couple hours ago" after Sgt. Jennings asked him if he had drugs in his bag and he said, "no." (E, 30–31.)

At this time, Sgt. Jennings felt that there was probable cause to believe that Defendant had drugs on his person. (E, 32–33.) This was "based . . . on everything that led up to where we were at based on the original tip that came [in]. Everything stemmed out pretty much perfectly from that where the time frame, the destination, the actual individual in that tip was there, the – the indication from the K-9 officer. Just based on the whole entire circumstance leading up to that point." (E, 33, 45.) Everything the tipster had said was "[v]ery accurate." (E, 33.)

Sgt. Jennings then "[b]asically I said [to Defendant], I'm gonna search you and he kind of nodded and half-heartedly said, yes."[6] (E, 31, 42–43.) Defendant remained handcuffed. (E, 39.) Sgt. Jennings lifted Defendant's long white T-shirt. (E, 31.) Defendant's pants "were very low on a – real, real low where you could see a lot of the white boxer shorts that were underneath," and the sergeant could see the fly of the boxer shorts as he lifted the shirt. (E, 31–32.) When Sergeant Jennings looked, "everything was compressed and it was kind of spread open," and he "could see . . . the top or the tip of what looked to appear to be a clear sandwich bag." (E, 32.) He had to lift Defendant's shirt to see it. (E, 41.) Based on his past experience, he believed that Defendant "was concealing what probably was narcotics in his crotch area." (E, 32.) The sandwich bag he found contained 67.9 grams of a brown substance, which field tested positive as heroin. (PE, 12–13; *see* Footnote 7, *infra*.) About ten minutes had passed since Defendant was handcuffed. (PE, 20.) Defendant was arrested and taken to the Oakland County Jail. (E, 7, 34–35, 41.)

[6] The sergeant said this as "pretty much a statement," not a question. (E, 31.) However, in his mind he was asking Defendant. (E, 43.) If Defendant had said no, then the sergeant would not have searched him and instead would have tried another means to continue the investigations. (E, 40, 43.)

Deputy Kevin Thomas was also present at the Pontiac bus station that day. (E, 5.) Another deputy, Deputy Morton, gave him a Michigan identification card bearing the name Kamone Dwayne Robertson and a birthdate of August 8, 1979. (E, 5–6, 9.) Deputy Morton had run the card through the LEIN system in his car, but he could not find any information on it. (E, 6.) Deputy Thomas saw the results, or lack thereof, on Deputy Morton's computer screen. (E, 8.) Deputy Morton gave the card to Deputy Thomas to see if he could find any information. (E, 6.) When Deputy Thomas ran the card through the computer system in his vehicle, it came back as having no record in LEIN. (E, 6, 8.) This meant that the number on the card was invalid. (E, 6–7.) The LEIN system was functioning properly and was accessible without any issues. (E, 9.) Deputy Thomas informed one of the NET officers of his findings. (E, 8–9.)

Several hours later, Sgt. Jennings learned that Defendant's true identity was discovered at the jail. (E, 35.) Defendant had a valid parole warrant outstanding. (E, 35.) Sgt. Jennings already knew that the other officers had checked the LEIN system for Kamone Robertson, and he had the results of their check on the status of the identification card after Defendant was handcuffed and searched. (E, 42–43.)

Procedural Matters:

A preliminary examination was held in the 50th District Court in Pontiac on July 31, 2012. (PE, 3.) Sgt. Jennings testified at the examination.[7] (PE, 5–20.) Detective Mark Ferguson also testified.[8] (PE, 22–26.) Defendant was bound over. (P, 28.)

[7] Sgt. Jennings' testimony at the preliminary examination was consistent with his testimony at the later evidentiary hearing described above. The only additional testimony of note from the preliminary examination that was not covered at the evidentiary hearing pertained to what was recovered from Defendant. At the preliminary examination, Sgt. Jennings noted that when he retrieved a plastic baggie from inside Defendant's boxer shorts, the baggie was found to contain a brown substance that field tested positive for heroin. (PE, 12–13.) The defense stipulated that the substance weighed 67.9 grams. (PE, 13.) This information was addressed in the initial motion

On August 13, 2012, Defendant was arraigned before Judge Anderson. Defendant later filed a motion to suppress the physical evidence, and an evidentiary hearing was held on December 20, 2012. The People rested after Sgt. Jennings' testimony concluded. (E, 45.) After hearing arguments from both parties, the circuit court requested briefs. (E, 45–60.)

On April 3, 2013, the circuit court entered an Opinion and Order suppressing the evidence.[9] The court rejected each of the arguments against suppression advanced by the People, primarily relying on the fact that Defendant was not the initial person of interest in the Crime Stoppers tip. [*See* Appendix A, at 5–6.] The court concluded that the arrest and search could not be justified based on the information regarding smoking marijuana because it was learned after what the court believed to be an "improper detention." [Appendix A, at 6–7.] The court applied similar reasoning to the false identification card. [Appendix A, at 7–8.] The court also rejected the People's argument that even if probable cause was lacking, the evidence obtained from the search was not fruit of the poisonous tree because the taint was purged by the subsequent discovery of a valid warrant for Defendant's arrest. [Appendix A, at 8–10.] The court stated that "the evidence was acquired during the illegality and no knowledge of the warrant was gained until Defendant was booked at the jail. This Court is unable to place the discovery of the warrant back in time to dispel the illegal taint of the evidence." [Appendix A, at 9.] Accordingly, the court granted Defendant's motion to suppress. [Appendix A at 1, 10.] The court later dismissed the case on April 8, 2013. (H, 4.)

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to suppress and People's response filed with the circuit court prior to the December 20, 2012 evidentiary hearing. A court may rely on the preliminary examination testimony and the testimony at a later evidentiary hearing to resolve a motion to suppress. *See* MCR 6.110(D).

[8] Det. Ferguson was the officer who took the Crime Stoppers tip and presented the warrant in this case. (PE, 24–25.)

[9] For ease of reference, a copy of the Opinion and Order is attached as People's Appendix A, and a copy of the Court of Appeals' opinion reversing and remanding is attached as People's Appendix B.

The People appealed by right, and the Court of Appeals reversed and remanded for reinstatement of the charge. *Robertson*, unpub op at 1, 7. The Court concluded that the record showed that Sgt. Jennings, a qualified expert in narcotics trafficking, conducted a valid investigatory stop of Defendant based on Defendant's arrival at the bus station with someone suspected of transporting heroin, the sergeant's background knowledge on the behavior of narcotics traffickers, the absence of heroin on Jackson's person, and Defendant's nervous behavior. *Id.* at 4–5. The Court also concluded that the use of handcuffs did not convert the investigatory stop to an arrest. *Id.* at 5. Finally, the Court concluded that the officers, after diligently pursuing the investigation, had probable cause to arrest Defendant based on the drug-sniffing dog's positive alert on Defendant's bag and his admission to smoking marijuana; thus, the search was a proper search incident to arrest. *Id.* at 5–7.

Defendant filed an application for leave to appeal to this Honorable Court, and the People filed an answer. On June 10, 2015, this Court entered an order scheduling this matter for argument on Defendant's application and ordering the parties to file supplemental briefs addressing whether the Court of Appeals erred by reversing the circuit court's dismissal and suppression orders. *Robertson*, __ Mich at __. The People now file their supplemental brief. Additional pertinent facts may be discussed in the body of this brief's Argument section to the extent necessary to fully advise this Honorable Court as to the arguments raised herein.

ARGUMENT

I. **The Court of Appeals correctly concluded that the circuit court erred in suppressing the evidence when the record established that Defendant's actions, along with the other circumstances known to the officers, provided reasonable suspicion for an investigatory stop. The officers acted quickly to confirm or dispel their suspicion that Defendant was transporting narcotics, and probable cause to arrest Defendant was established based on a drug-sniffing dog's alert on Defendant's bag, Defendant's admission to smoking marijuana, and Defendant's presentation of a false identification card.**

Standard of Review & Issue Preservation:

This Court reviews de novo a trial court's ultimate ruling on a motion to suppress evidence, because the application of constitutional standards to essentially uncontested facts is accorded less deference than factual findings. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). Factual findings are reviewed for clear error. *Id.*; MCR 2.613(C). A finding is clearly erroneous "'if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.'" *State v McQueen*, 493 Mich 135, 147; 828 NW2d 644 (2013), quoting *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

This issue was preserved for appellate review by Defendant's motion to suppress.

Discussion:

A. Summary of the People's argument.

The Court of Appeals did not err by reversing the circuit court's orders suppressing the evidence and dismissing the case. This case involved essentially uncontested facts concerning the events at the Pontiac bus station on July 12, 2012, and the Court of Appeals correctly concluded that the circuit court improperly applied the constitutional standards for search and seizure to those facts. The officers had reasonable suspicion to detain Defendant for a brief investigatory stop after they saw him arrive at the bus station with Leroy Jackson, who was suspected of transporting heroin, because they knew from their experience that narcotics

traffickers often travel in pairs and use bus stops to travel for their deliveries and pick-ups. Despite already having reasonable suspicion to investigate Defendant, though, an officer only initially engaged Defendant in a brief conversation while Jackson was arrested immediately on an outstanding warrant. Defendant was not seized for investigatory purposes until he began acting very nervous, at which time he was handcuffed for safety reasons, as is allowed to maintain the status quo during an investigatory stop.

The officers then diligently pursued their investigation in order to quickly confirm or dispel their suspicion that Defendant was involved in transporting narcotics. A drug-sniffing dog, which was already present at the scene, alerted on Defendant's bag. Defendant admitted he had smoked marijuana that day. Either the dog's positive alert or Defendant's statement alone gave the officers probable cause to arrest him because there was a fair probability that he was carrying narcotics; a search of Defendant's bag that revealed no narcotics simply increased the odds that they were on his person. Additionally, Defendant had presented the officers with a Michigan identification card before he was handcuffed, and two officers on the scene found that the card was an invalid false identification. The officers thus had probable cause to arrest Defendant on multiple grounds. The search of Defendant's person, which occurred *after* all of those bases for arrest were established in a short period of time, was therefore a proper search incident to arrest.

The circuit court incorrectly categorized the investigatory stop of Defendant as an illegal arrest without recognizing that it was a permissible stop based on reasonable suspicion in light of Defendant's actions and the officers' knowledge and experience. When the officers' conduct is analyzed under the appropriate legal framework and in light of the totality of the circumstances, as the Court of Appeals did, it is clear that the initial investigatory stop, the search, and the arrest were all reasonable and proper. Accordingly, this Court should deny leave to appeal.

B. The police lawfully stopped Defendant for investigative purposes based on the totality of the circumstances presented.

Both the United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). In general, a search and seizure conducted without probable cause is unreasonable. *See People v Champion*, 452 Mich 92, 97–98; 549 NW2d 849 (1996). However, "[a] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v Bostick*, 501 US 429, 434; 111 S Ct 2382; 115 L Ed 2d 389 (1991). Likewise, an officer may ask an individual for his identification without violating the Fourth Amendment. *Hiibel v Sixth Judicial Dist Court of Nevada*, 542 US 177, 185; 124 S Ct 2451; 159 L Ed 2d 292 (2004).

As an initial matter, in this case Leroy Jackson and Defendant arrived together and were standing outside the bus station together when the officers first approached them. (E, 24–25.) Sgt. Jennings yelled out "[H]ey Leroy," and Jackson turned. (E, 25.) The sergeant identified himself and asked Jackson for identification, which Jackson provided. (E, 25.) Jackson was arrested immediately on an outstanding warrant and searched, though nothing was found on him. (E, 25–27.) Sgt. Jennings then spoke to Defendant. (E, 25.) When asked his destination, Defendant, like Jackson, said that they were "going up north" toward St. Ignace. (E, 33.) Sgt. Jennings asked Defendant for identification and Defendant produced an identification card. (E, 26.) Defendant was not handcuffed. (E, 28, 35.) Sgt. Jennings was allowed to approach Defendant, ask him questions, and ask to see his identification. *Hiibel*, 542 US at 185; *Bostick*, 501 US at 434. However, Sgt. Jennings would have been fully justified in immediately conducting a brief seizure of Defendant for investigative purposes in any event.

In *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court carved out an exception to the general rule that a search or seizure conducted without probable cause is unreasonable. The Court held that the Fourth Amendment permits the police to stop and briefly detain a person based on "reasonable suspicion that criminal activity may be afoot." *Terry*, 392 US at 30–31. The *Terry* exception has been extended to incorporate investigative stops under a variety of circumstances for specific law enforcement needs. *People v Nelson*, 443 Mich 626, 631; 505 NW2d 266 (1993). The appropriate test for the validity of an investigative stop under this doctrine is as follows:

> In order for law enforcement officers to make a constitutionally proper investigative stop, they must satisfy the two-part test set forth in *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. That suspicion must be reasonable and articulable . . . . [*Nelson*, 443 Mich at 632 (internal citations omitted).]

Thus, reasonable suspicion—not probable cause—was needed to effectuate a valid investigatory stop of Defendant. *Id*.

The reasonableness of suspicion is measured by what the police knew before a stop. *Florida v JL*, 529 US 266, 271; 120 S Ct 1375; 146 L Ed 2d 254 (2000). An officer's actions must be supported by "[s]ome minimal level of objective justification." *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L Ed 2d 1 (1989), quoting *INS v Delgado*, 466 US 210, 217; 104 S Ct 1758; 80 L Ed 2d 247 (1984) (internal quotation marks omitted). Seemingly innocent behavior may form the basis of an officer's reasonable suspicion if the officer, based on training and experience, can "perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer." *Brown v Texas*, 443 US 47, 52 n 2; 99 S Ct 2637; 61 L Ed 2d 357 (1979). Overly technical reviews of such assessments are improper, because deference

should be given to a law enforcement officer's experience and knowledge that certain behavior may indicate criminal behavior. *Nelson*, 443 Mich at 636. It is the totality of the circumstances that determines whether reasonable suspicion exists, not each individual factor in isolation. *United States v Arvizu*, 534 US 266, 274–275; 122 S Ct 744; 151 L Ed 2d 740 (2002); *Cortez*, 449 US at 417–418; *United States v Winters*, 782 F3d 289, 301 (CA 6, 2015). Courts must also be mindful to take into account the evolving circumstances that an officer faces when determining whether a stop is reasonable. *See Williams*, 472 Mich at 315 (noting that "[t]he determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced.").

The Supreme Court's decision in *Arvizu*, 534 US at 266, illustrates the method of analysis required when evaluating a stop based on reasonable suspicion. In *Arvizu*, the United States District Court for the District of Arizona upheld the stop of the respondent's minivan, which eventually led to the seizure of over 125 pounds of marijuana. *Id.* at 272–273. The District Court considered several factors, including 1) respondent slowing his vehicle when passing the border patrol agent who later stopped him, 2) respondent's failure to acknowledge the agent in any way as he drove past, 3) the fact that the knees of the children riding in the back seat of the van were "raised," 4) the children's "odd" and "abnormal" waving after the agent began to follow the minivan, 5) the agent's knowledge that the road was often used by drug smugglers, 6) the "temporal proximity between respondent's trip and the agents' shift change" when smugglers were known to be more active, and 7) the use of minivans by smugglers. *Id.* at 268–273. However, the Ninth Circuit Court of Appeals reversed, examining each factor considered by the District Court in turn and holding that several of the factors "carried little or no weight in the reasonable-suspicion calculus." *Id.* at 272. The Court of Appeals then held that the remaining

factors, specifically the road's use by smugglers, the timing of the trip, and the use of minivans by smugglers, were "not enough to render the stop permissible." *Id.* at 272–273.

The Supreme Court granted certiorari and unanimously reversed. *Id.* at 268, 273. The Court emphasized its repeated holdings that reasonable suspicion determinations must be made by looking at the totality of the circumstances, which "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative information available to them* that 'might well elude an untrained person.'" *Id.* at 273, quoting *Cortez*, 449 US at 417 (emphasis added). While recognizing that the concept of reasonable suspicion "is somewhat abstract," the Court held that "the approach taken by the Court of Appeals here departs sharply from the teachings of [the Supreme Court's prior] cases." *Id.* at 274. The Court rejected the Court of Appeals' apparent belief "that each observation by [the agent] that was *by itself* readily susceptible to an innocent explanation was entitled to 'no weight.'" *Id.*, quoting *United States v Arvizu*, 232 F3d 1241 (CA 9, 2000) (emphasis added). The Court explained that *Terry* "*precludes this sort of divide-and-conquer analysis*" because each act in a series, while perhaps innocent on its own, may warrant further investigation when "taken together." *Id.* at 274–275, citing and quoting *Terry*, 392 US at 22 (emphasis added). Ultimately, the Court concluded that the Court of Appeals' approach would "seriously undercut" the "totality of the circumstances" principle and emphasized that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Id.* at 275–277.

In this case, Sgt. Jennings would have been fully justified in immediately conducting a stop of Defendant—based on reasonable suspicion—rather than taking time to pose questions to Defendant while Jackson was being arrested. The information initially known to Sgt. Jennings (and then as he spoke to Defendant) was more than sufficient to support a "reasonable suspicion

that criminal activity [was] afoot." *Terry*, 392 US at 30–31. First, Sgt. Jennings knew about the Crime Stoppers tip concerning Jackson, which said that Jackson would arrive at the Pontiac bus station around noon on July 12, 2012 to travel "up north via bus" with some heroin. (E, 21–23.) After the police gathered information on Jackson and set up surveillance at the bus station, Sgt. Jennings learned that Jackson was there. (E, 23–24.) However, he was not alone; Defendant was with him. (E, 24; PE, 7.) The two men arrived at about the time stated in the tip.[10] (E, 24–25.)

Considering each of these pieces of initial information *in isolation* might otherwise lead to a conclusion that there was no reasonable suspicion. For instance, if the only information known to Sgt. Jennings was that Defendant was in proximity to Jackson, then an investigative stop of Defendant likely would have been improper. Likewise, if the sergeant only knew that Defendant was present in an area known to be used by narcotics traffickers, then an investigative stop likely would have been improper. However, when viewing these facts together and combining them with the other information known to the officers (see below), Sgt. Jennings had at least the "minimal level of objective justification" needed to stop Defendant. *Sokolow*, 490 US at 7. *See also Arvizu*, 534 US at 274–275 (noting that *Terry* forbids a "divide-and-conquer" analysis of the factors supporting an officer's reasonable suspicion).

In addition to Defendant's proximity to Jackson and his presence in a place known to be used by narcotics traffickers, Defendant and Jackson (who was suspected of transporting heroin)

[10] When an anonymous tip is suitably corroborated—such as through the officer's observation of a suspect's movements as they were previously predicted to occur in the tip—the tip will be found to exhibit sufficient indicia of reliability such that it provides reasonable suspicion for an investigative stop. *JL*, 529 US at 270–271; *Alabama v White*, 496 US 325, 329–332; 110 S Ct 2412; 110 L Ed 2d 301 (1990); *People v Faucett*, 442 Mich 153, 155; 499 NW2d 764 (1993). In this case, the tip was corroborated by the tipster's timely and accurate predictions of Jackson's movements, which suggested a "special familiarity" with his affairs. *White*, 496 US at 332. This was unlike the situation presented in *JL*, where no predictive information was provided and the police thus were unable to test the tipster's knowledge or credibility. *JL*, 529 US at 271.

arrived in the same vehicle. (E, 24; PE, 7.) Thus, their proximity was not merely coincidental and suggested a common purpose. *See Wyoming v Houghton*, 526 US 295, 304; 119 S Ct 1297; 143 L Ed 2d 408 (1999) (noting that a car's passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."). Furthermore, Sgt. Jennings had been a sheriff's deputy for over 21 years and a narcotics officer for 8 years, and he was later qualified as an expert in narcotics trafficking at the evidentiary hearing in this case based on his extensive training, his participation in "[h]undreds" of narcotics investigations, and his prior in-court expert qualifications. (E, 20–22.) Even though the Crime Stoppers tip only mentioned Jackson, Sgt. Jennings knew that it was "very common" for narcotics traffickers to travel in pairs. (E, 32, 35.) It was also established at the preliminary examination that the police were well aware that narcotics traffickers use bus stops to travel for delivery and pick up purposes. (PE, 23.) The sergeant thus was able to draw on "experience and specialized training to make inferences from and deductions about the cumulative information available to [him] that 'might well elude an untrained person,'" which, when coupled with his on-scene observations, would have justified an investigative stop before he ever spoke to Defendant. *Arvizu*, 543 US at 273, quoting *Cortez*, 449 US at 417. *See also Brown*, 443 US at 52 n 2; *Nelson*, 443 Mich at 636.

Moreover, Sgt. Jennings' interactions with Jackson and Defendant only added to his reasonable suspicion. Both men said that they were "going up north," toward St. Ignace. (E, 33.) Their luggage was in the bus station. (E, 27.) Sgt. Jennings asked Defendant for identification before he detained him, and Defendant provided an identification card. (E, 26.) He was not handcuffed at the time. (E, 28, 35.) During this initial conversation, Sgt. Jennings noticed Defendant was "real nervous, sweating." (E, 28, 35.) When the sergeant noted that Defendant

was sweating and asked why he was nervous, Defendant "just said it was hot outside." (E, 29.) On a scale of zero to ten, with zero being not nervous at all and ten being "the most nervous you've ever seen somebody," Defendant was at "about a seven." (E, 29.) At the preliminary examination, the sergeant characterized Defendant as "real nervous" and "real jittery." (PE, 9.) This Court has held, in accordance with United States Supreme Court precedent, that "'nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.'" *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001), quoting *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000). Sgt. Jennings noted that, in addition to Defendant's nervous behavior, Defendant was a "good-sized person," and based on his own feeling that "something was wrong," he placed Defendant in handcuffs not to arrest him, but for safety. (E, 28, 35.)

Sgt. Jennings could properly consider all of this additional information when determining whether there was a reason to detain Defendant for investigative purposes. *Nelson*, 443 Mich at 632, 636. Based on the "totality of the circumstances," it was entirely proper for Sgt. Jennings to stop Defendant for investigative purposes either immediately on contact or after their initial conversation. *Arvizu*, 534 US at 274–275; *Terry*, 392 US at 30–31; *Nelson*, 443 Mich at 632. The circuit court acknowledged in its Opinion and Order that only reasonable suspicion was required to make a valid investigatory stop. [Appendix A, at 3–5.] Yet, the court then immediately analyzed whether there was *probable cause* to *search* Defendant, wholly ignoring whether the investigative stop was properly based on reasonable suspicion and repeatedly characterizing Defendant's detention as "improper."[11] [Appendix A, at 5–8, 10.] The Court of Appeals correctly held otherwise, analyzing the facts using the applicable law. This was not error.

[11] *See* Appendix A, at 7 ("[T]he People cannot now legitimize the improper detention in this case based on this information which was received after the fact."); *id.* at 7–8 ("In this case however, there was not probable cause for the detention, search or questioning of Defendant, nor was the

C. The use of handcuffs for safety purposes to maintain the status quo during the investigation did not convert the lawful investigative stop into an arrest.

As discussed above, Defendant was properly detained for investigative purposes based on a reasonable suspicion that criminal activity by Defendant was afoot. *Terry*, 392 US at 30–31. Sgt. Jennings use of handcuffs for safety purposes while the officers conducted their investigation did not convert the lawful *Terry* stop into an illegal arrest.

It is true that an individual is not free to leave when handcuffed, *i.e.*, he is seized. *See People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). However, the use of force—such as handcuffing—is not barred during the course of a *Terry* investigative stop. As the *Terry* Court itself recognized, it is "unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 US at 23. Consequently, officers may use forcible means when "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v Hensley*, 469 US 221, 235; 105 S Ct 675; 83 L Ed 2d 604 (1985). There is no bright line rule of when an investigative stop becomes an arrest, because an officer's use of force must be judged objectively from the perspective of a reasonable officer. *Graham v Connor*, 490 US 386, 395–396; 109 S Ct 1865; 104 L Ed 2d 443 (1989). Michigan courts have, accordingly, long held that a brief but complete restriction of a person's liberty using handcuffs, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest.[12] *People v Green*, 260 Mich App 392, 397–398; 677 NW2d 363 (2004), overruled in part on other grounds by *People v Anstey*,

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same done pursuant to a warrant."); *id.* at 10 ("There was no valid basis to detain and arrest Defendant at the time of the search . . . .").

[12] In fact, the Court of Appeals has even held that an officer's use of his or her weapon does not automatically transform an investigative stop into an arrest, *People v Randle*, 133 Mich App 335, 339; 350 NW2d 253 (1984), nor does placing an individual into a police car. *People v Marland*, 135 Mich App 297, 302–303; 355 NW2d 378 (1984).

476 Mich 436, 447; 719 NW2d 579 (2006) (finding that the use of handcuffs for safety purposes does not automatically convert an investigative stop into an arrest); *People v Zuccarini*, 172 Mich App 11, 14; 431 NW2d 446 (1988) (same).

The appellate courts of many of our sister states are in accord as well.[13] For example, the Supreme Court of Louisiana recently held that use of handcuffs for the duration of a *Terry* investigative stop is permissible and does not necessarily convert the stop to an arrest. *State v Duhe*, 130 So 3d 880, 886–887 (La, 2013). The *Duhe* Court took special note of the "well-known association of guns and narcotics trafficking generally" as reasonable justification for the officers' use of handcuffs during the *Terry* stop at issue, which involved possible narcotics trafficking. *Id.* Likewise, the Missouri Court of Appeals last year held that the use of handcuffs during a *Terry* investigative stop is proper when, under the totality of the circumstances, an "officer believes that he needs to take reasonably necessary precautions to protect himself or the public or to maintain the status quo." *State v Johnson*, 427 SW3d 867, 874 (Mo App, 2014). The *Johnson* Court explained that the use of such force is entirely permissible so long as "the duration of time during which the subject is in handcuffs [does] not exceed the necessary amount

[13] Ten federal Courts of Appeals have also held that the use of handcuffs does not necessarily turn a lawful *Terry* stop into an arrest. *See United States v Laing*, 889 F2d 281, 285 (CA DC, 1989), cert den 494 US 1069; 110 S Ct 1790; 108 L Ed 2d 792 (1990) (use of handcuffs); *United States v Esieke*, 940 F2d 29, 36 (CA 2, 1991), cert den 502 US 992; 112 S Ct 610; 116 L Ed 2d 632 (1991) (handcuffs and leg irons); *United States v Crittendon*, 883 F2d 326, 329 (CA 4, 1989) (handcuffs); *United States v Sanders*, 994 F2d 200, 205–208 (CA 5, 1993), cert den 510 US 955; 114 S Ct 408; 126 L Ed 2d 355 (1993) (stopping defendant at gun point, ordering him to lie on the ground, and handcuffing him); *United States v Hurst*, 228 F3d 751 (CA 6, 2000) (use of handcuffs); *United States v Smith*, 3 F3d 1088, 1094–1095 (CA 7, 1993), cert den 510 US 1061; 114 S Ct 733; 126 L Ed 2d 696 (1994) (handcuffs); *United States v Navarrete-Barron*, 192 F3d 786 (CA 8, 1999) (suspect handcuffed and placed in a police car); *Allen v Los Angeles*, 66 F3d 1052 (CA 9, 1995) (pointing a weapon at a suspect, ordering him to lie on the ground, handcuffing him, and placing him in a patrol car for questioning); *United States v Merkley*, 988 F2d 1062, 1064 (CA 10, 1993) (display of firearms and use of handcuffs); *United States v Kapperman*, 764 F2d 786, 790 n 4 (CA 11, 1985) (placing suspects in police car in handcuffs).

of time to conduct an investigation" and concluded that the use of handcuffs was proper because the defendant was only handcuffed for the officers' safety while a computer inquiry was run to see if the defendant had any outstanding warrants. *Id.* at 874–875.[14]

In this case, Sgt. Jennings' use of handcuffs during the course of a valid investigatory stop based on reasonable suspicion was entirely proper. *Graham*, 490 US at 395–396. The officers were investigating alleged narcotics trafficking at a location they knew was used for that purpose. (E, 21–23; PE, 23.) While they expected, based on the Crime Stoppers tip, to encounter only Jackson, they instead encountered Defendant as well. (E, 24; PE, 7.) It was "very common" for narcotics traffickers to travel in pairs. (E, 32.) Jackson was known to have outstanding warrants for his arrest. (E, 25.) Furthermore, Defendant and Jackson had not just met each other at the Pontiac bus station by chance, but instead arrived together in the same vehicle. (E, 24–25;

[14] Several other states' appellate courts have reached similar holdings. *See People v Turner*, 219 Cal App 4th 151, 162–164; 161 Cal Rptr 3d 567 (2013) (holding that handcuffing the defendant at gunpoint was not a de facto arrest); *Studemire v State*, 955 So 2d 1256, 1257 (Fla App, 2007) (citing prior Florida case law to note that the use of handcuffs does not automatically turn an investigatory stop into a de facto arrest and concluding that the use of handcuffs during an investigative stop was proper); *Jackson v State*, 236 Ga App 492, 495; 512 SE2d 24 (1999) (same); *People v Bennett*, 376 Ill App 3d 554, 565; 876 NE2d 256 (2007) (noting that an investigatory stop is distinguished from an arrest based on the length of detention and the scope of the investigation that occurs after the stop, not the initial restraint on movement, and holding that the use of handcuffs was proper); *Holbert v State*, 996 NE2d 396, 400 (Ind App, 2013) (holding that when the officers stopped the defendant based on a reasonable suspicion that he committed a burglary, they had a right to briefly place him in handcuffs and frisk him); *Miller v Commonwealth*, 321 SW3d 275, 277–278 (Ky App, 2010) (holding that the officer's use of handcuffs during an investigative stop was appropriate when a single officer encountered two people on a busy highway, after a traffic accident, where the presence of marijuana was suspected, and where a vehicle search was intended); *Barnes v State*, 437 Md 375, 391; 86 A3d 1246 (2014) (noting that a seizure is not automatically elevated into an arrest simply because the police use measures more traditionally associated with an arrest and an investigative stop); *State v Carrouthers*, 213 NC App 384, 389–390; 714 SE2d 460 (2011) (listing various circumstances in which the use of handcuffs may be appropriate during an investigative stop, including when the suspect is uncooperative, the officer has information the suspect is armed, the suspect acts in a manner that raises a reasonable possibility of danger or flight, or the suspects outnumber the officers).

PE, 7.) Both men planned to travel up north, and their luggage was side-by-side inside the bus station. (E, 27, 33.) After their initial encounter, Defendant began to act nervous and jittery as Sgt. Jennings spoke to him. (E, 28–29, 35.) While the sergeant later testified that people often become nervous when he approaches them, in this case Defendant became so nervous that it caused the sergeant to fear for his safety, especially considering Defendant's size. (E, 28, 35.) The sergeant also walked Defendant around a corner, away from the other officers, in order to separate him from Jackson. (E, 37.) The use of handcuffs was prudent. *Graham*, 490 US at 395–396; *Hensley*, 469 US at 235. *See also Duhe*, 130 So 3d at 886–887 (noting the "well-known association" between firearms and narcotics trafficking).

In any event, however, the People note that even if Sgt. Jennings' decision to detain and handcuff Defendant was an improper arrest despite these circumstances, it was not fatal to the eventual search. Even if an individual is at first unlawfully detained, if the police discern grounds for arrest based on probable cause while the person is detained and then discover incriminating evidence, then that evidence should not be suppressed. *See New York v Harris*, 495 US 14, 18–19; 110 S Ct 1640; 109 L Ed 2d 13 (1990) (holding that the defendant's statement taken outside of his home was admissible after he was initially illegally arrested inside his home without a warrant but with probable cause); *People v Lambert*, 174 Mich App 610, 618; 436 NW2d 699 (1989) ("[W]here the police have unlawfully stopped or detained a citizen and then discover that the person detained is the proper subject of a lawful arrest on grounds other than the original illegal stop, the police may make the arrest and any evidence obtained as a result of the lawful arrest is admissible."). The key inquiry is whether "evidence was gained by exploitation of the alleged illegality." *People v Davis*, 250 Mich App 357, 364–365; 649 NW2d 94 (2002). The police do not exploit an alleged illegality if, for example, the suspect commits a new crime, even

if that crime "is in response to police misconduct and causally connected thereto." *United States v Bailey*, 691 F2d 1009, 1017–1018 (CA 11, 1982). *See also State v Stilley*, 261 Ga App 868, 870–871; 584 SE2d 9 (2003). In this case, Sgt. Jennings' decision to place Defendant in handcuffs did not contribute to the drug-sniffing dog's positive alert on Defendant's bag, Defendant's admission to smoking marijuana, or the discovery by Deputies Morton and Thomas that the identification card provided by Defendant was an invalid fake identification. *See* Part I.D. The officers still would have quickly developed probable cause to arrest Defendant, as discussed below, even if he was never handcuffed. *Davis*, 250 Mich App at 365.

Ultimately, based on the totality of the circumstances known to Sgt. Jennings, restraining Defendant in handcuffs during the investigative stop was a reasonable course of action. The use of handcuffs did not convert the lawful *Terry* stop into an arrest because it was not excessive in light of the circumstances. *Green*, 260 Mich App at 397–398. The circuit court erred when it acknowledged the reasonable suspicion standard of *Terry* but then failed to apply it to the facts of this case, instead repeatedly characterizing the investigative stop and handcuffing as improper. The Court of Appeals correctly concluded that the circuit court did not properly apply the pertinent constitutional standard to the facts of the case and reversed. This was not error.

D. The drug-sniffing dog's positive alert on Defendant's luggage while Defendant was lawfully stopped for investigative purposes, his admission to smoking marijuana, and his possession of a false identification card provided probable cause for his arrest.

During the course of the investigative stop, Sgt. Jennings and his colleagues learned additional facts that supported their suspicion that Defendant was involved in narcotics trafficking. A drug-sniffing dog alerted on Defendant's luggage, which was sitting in the open in a public place. Defendant admitted to smoking marijuana, and his identification card was found to be false. This additional knowledge gave the officers probable cause to arrest Defendant.

An officer may make an arrest when a felony or a misdemeanor was committed in his presence or he has reasonable cause to believe that a person committed a felony or a misdemeanor punishable by more than 92 days. MCL 764.15(1). Probable cause to arrest depends upon whether the facts and circumstances within the arresting officers' knowledge were sufficient to warrant a prudent man in believing the suspect had committed an offense. *Adams v Williams*, 407 US 143, 148; 92 S Ct 1921; 32 L Ed 2d 612 (1972); *Champion*, 452 Mich at 115. "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Illinois v Gates*, 462 US 213, 237; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Probable cause is not a standard of absolute certainty but mere probability, *Adams*, 407 US at 149, and only requires a probability or substantial chance of criminal activity, not an actual showing of criminal activity. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Probable cause is traditionally determined on the basis of the totality of the circumstances. *See Adams*, 407 US at 149. Moreover, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, *viewed objectively*, justify that action." *Scott v United States*, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 168 (1978) (emphasis added); *People v Arterberry*, 431 Mich 381, 384; 429 NW2d 574 (1988), quoting *Scott*, 436 US at 138.

The positive alert of a trained drug-sniffing dog provides law enforcement officers with probable cause to arrest a person. In 1983, the United States Supreme Court explained that a drug-sniffing dog's failure to alert on an item, such as an individual's luggage, will likely result in his or her release while "a positive result" will result in a "justifiable arrest on probable

cause." *Florida v Royer*, 460 US 491, 505–506; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion). Courts across the country have reached similar holdings in the intervening decades. *See United States v Anchondo*, 156 F3d 1043, 1045 (CA 10, 1998) ("Here, the canine alerted twice on the inside of the defendant's car . . . [which] provided the probable cause necessary to arrest the defendant."); *United States v Sinclair*, 983 F2d 598 (CA 4, 1993) ("Moreover, the Supreme Court has made it clear that when a trained narcotics dog alerts to an item, as in this case, the police have probable cause to arrest."); *United States v Knox*, 839 F2d 285, 294 n 4 (CA 6, 1988) ("[T]he positive reaction of the . . . dog alone would have established probable cause to not only search defendants' luggage, but to arrest them immediately."); *State v Ofori*, 170 Md App 211, 221; 906 A2d 1089 (2006) (discussing a drug sniffing dog's alert to the probable presence of contraband drugs in a vehicle and noting that the officers "had unquestionable probable cause for the warrantless arrest of the appellee as the driver of the Cadillac[.]").[15]

The usefulness of a drug-sniffing dog's alert in an officer's probable cause analysis does, however, depend in part on the location of the item sniffed. For instance, a dog's positive alert on an item located in a public place does not raise Fourth Amendment concerns, while an alert on a home or its immediate surroundings does. *Compare People v Jones*, 279 Mich App 86, 93; 755 NW2d 224 (2008) ("[A] canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused.") *with Florida v Jardines*, 569 US __; 133 S Ct 1409; 185 L Ed 2d 495 (2013) (holding that the use of trained police dogs to investigate a home and its immediate surroundings is a

[15] Legal scholars have also noted that a trained drug-sniffing dog's alert provides probable cause to arrest. Wayne R. LaFave, 1 *Search and Seizure* § 2.2(g), pp 526–527 (4th ed 2004) ("In light of the careful training which [drug-detection dogs] receive, an *alert by a dog is deemed to constitute probable cause for an arrest* or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband.") (footnotes omitted and emphasis added).

search within the meaning of the Fourth Amendment). While a person retains a privacy interest in the contents of containers, such as luggage, that are located in a public place:

> [The use of a drug-sniffing dog] does not require opening the luggage. It does not expose noncontraband items that would otherwise remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. [*United States v Place*, 462 US 696, 707; 103 S Ct 2637; 77 L Ed 2d 110 (1983).]

Stated otherwise, a dog's sniff of an item located in a public place while its owner is lawfully detained only risks exposing possibly illegal activity by the owner of the sniffed item rather than lawful activities without requiring an actual, intrusive search of the item. *See Illinois v Caballes*, 543 US 405, 409–410; 125 S Ct 834; 160 L Ed 2d 842 (2005) (holding that dog sniff on exterior of car while respondent was lawfully seized is not unconstitutional).

In this case, viewed objectively, the circumstances presented were more than sufficient to provide probable cause for Defendant's arrest after he was lawfully detained for investigative purposes. Sgt. Jennings and his colleagues diligently pursued their investigation once Defendant was detained. *United States v Sharpe*, 470 US 675, 686–687; 105 S Ct 1568; 84 L Ed 2d 605 (1985) (holding that a court should examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly" when determining whether a detention is too long to be justified as an investigative stop). *See also Williams*, 472 Mich at 315 (noting that a stop is reasonable as long as the person is detained only to allow an officer to ask reasonable questions about the violation of law and its context "for a reasonable period"). In addition to all of the information discussed above, Defendant's bag was sniffed by a

trained drug-sniffing dog. Deputy David Curtis had been a K-9 handler for 13 years, and he had worked with his dog Finn for 8 years. (E, 11.) The pair was certified and trained weekly, and Finn could detect many drugs, including cocaine, crack, marijuana, heroin, and meth. (E, 11–13.) As an "aggressive active" dog, Finn scratched or bit at any odor he was trained to detect. (E, 13.)

On July 12, 2012, Deputy Curtis used Finn to attempt to determine whether two pieces of luggage in the Pontiac bus station contained the odor of narcotics. (E, 13.) Deputy Curtis was part of the team that originally set up surveillance on the bus station that day. (E, 24.) The two pieces of luggage were inside the station's waiting room, sitting side-by-side. (E, 14.) Deputy Curtis separated the bags, retrieved Finn, and then had him sniff the bags. (E, 14.) When Deputy Curtis gave Finn the command to sniff and began walking him around the bags at a quick pace, the dog alerted on both bags. (E, 14–15.) This told the deputy that the bags either had narcotics inside or had the odor of narcotics on the outside or inside. (E, 14–15.) He could tell that the odor was strong because Finn "immediately head snapped and dug into these two bags for strong odor," and his experience told him "that this was a fresh odor." (E, 18–19.)

Finn's positive alert on Defendant's luggage alone provided probable cause to arrest Defendant. *Royer*, 460 US at 505–506. The alert gave the police probable cause to believe that Defendant had committed, at the very least, a crime involving the possession of a controlled substance. MCL 333.7403. Finn's training was never challenged, and there was thus no reason for the deputies or the courts to doubt the reliability of Finn's sniff in this case. *See Florida v Harris*, 568 US __; 133 S Ct 1050, 1058–1059; 185 L Ed 2d 61 (2013) (holding that, in a probable cause hearing focusing on a drug-sniffing dog's positive alert, probable cause should be found if the state produces evidence of the dog's reliability and the defense does not contest that showing); *People v Clark*, 220 Mich App 240, 242–244; 559 NW2d 78 (1996) (same).

Defendant's bag was searched following Finn's positive alert, but no drugs were found. (E, 27.) As the Court of Appeals noted, though, the absence of contraband in the bag did not dissipate the officers' probable cause to arrest Defendant. [Appendix A, at 5 n 2.] This Court has recognized that "[o]nce established, probable cause to arrest, which is concerned with historical facts, is likely to continue indefinitely, absent the discovery of contrary facts."[16] *People v Russo*, 439 Mich 584, 605; 487 NW2d 698 (1992). *See also People v Geier*, 407 Ill App 3d 553, 559–560; 944 NE2d 793 (2011) (explaining that probable cause to arrest is distinct from probable cause to search because the former is based on historical facts and the latter is concerned with facts relating to presently existing conditions). The determination of whether there is probable cause to arrest is made by examining the events leading up to the arrest and deciding whether the facts, when viewed from the standpoint of an objectively reasonable officer, amount to probable cause. *Maryland v Pringle*, 540 US 366, 371; 124 S Ct 795; 157 L Ed 2d 769 (2003); *Champion*, 452 Mich at 115.

The absence of narcotics in Defendant's luggage did not, however, constitute contrary facts that dissipated probable cause to arrest Defendant. In *Harris*, 133 S Ct at 1059, the Supreme Court cautioned against "the hazards of inferring too much from the failure of a dog's alert to lead to drugs[.]" The Court explained that the petitioner, Harris, was involved in the manufacture of methamphetamine and that the associated odors likely "had transferred to the driver's side door handle of [Harris'] truck," which led to the drug-sniffing dog's alert. *Id.* Other courts have likewise recognized that the odor of illicit narcotics can be transferred from an individual to other items and that the failure to uncover contraband from an item that a drug-

[16] In contrast, "[p]robable cause to search is concerned with whether certain identifiable objects 'are probably to be found at the present time in a certain identifiable place.'" *Russo*, 439 Mich at 605, quoting Wayne R. LaFave, 2 *Search and Seizure* § 3.7, p 75 (2d ed).

sniffing dog alerts on merely increases the likelihood that the contraband is located on the suspect's person. *United States v Chartier*, 772 F3d 539, 545 (CA 8, 2014); *Anchondo*, 156 F3d at 1045. The drug-sniffing dog's alert still gives the officers probable cause to arrest, and any subsequent search of the suspect's person is proper as a search incident to arrest. *Chartier*, 772 F3d at 545–546 (holding that the search of the defendant's person was a proper search incident to arrest after the drug-sniffing dog alerted outside the passenger door where he was seated, a thorough search of the vehicle "revealed no obvious source of the scent[,]" and the vehicle's other occupant had already shown the contents of her pockets). *See also People v Nguyen*, 305 Mich App 740, 755–756; 854 NW2d 223 (2014) (holding that probable cause to arrest did not dissipate when an initial pat-down geared toward searching for weapons and a vehicle search did not reveal the cocaine, it was more probable that the cocaine was on the defendant).[17] Thus, in this case probable cause to arrest Defendant continued to exist even after the search of his luggage uncovered no illicit narcotics.

Furthermore, in addition to Finn's positive alert on Defendant's luggage, Sgt. Jennings also knew that Defendant admitted to using drugs before he was searched. Specifically, Sgt. Jennings asked Defendant why the dog would have alerted on his bag, and Defendant admitted that he had smoked marijuana earlier that day. (E, 29–30, 36.) This admission standing alone was sufficient to warrant a prudent officer in Sgt. Jennings' position in believing that Defendant had carried and still was carrying narcotics (specifically marijuana[18]) and that there was thus probable cause to arrest him. *Champion*, 452 Mich at 115. That conclusion was only strengthened when coupled with Finn's positive alert, given that Finn was trained to detect many

[17] This Court recently denied leave to appeal in the *Nguyen* case. *People v Nguyen*, __ Mich __ (2015) (Docket No. 149918).

[18] MCL 333.7403(2)(d) prohibits the knowing or intentional possession of marijuana and punishes that activity as a 1-year misdemeanor.

drugs including marijuana (E, 12–13), and all of the other circumstances known to the sergeant. *See Pringle*, 540 US at 371. Although the initial tip involved heroin (E, 22), rather than marijuana, Sgt. Jennings' subjective belief as to which drug Defendant might be carrying was ultimately irrelevant. *Scott*, 436 US at 138; *Arterberry*, 431 Mich at 384.

Finally, as the People argued in the lower courts, the officers also had probable cause to arrest Defendant for presenting a false identification card.[19] Sgt. Jennings was unaware at the time of the search that the identification card Defendant presented was invalid, and he admitted so at the evidentiary hearing. (E, 41–43.) However, Deputies Morton and Thomas were at the bus station and had run the card through the LEIN computer system in their patrol cars. (E, 5–9.) The card came back as having no record, which meant that the number on it was not valid. (E, 5–9.) Both deputies thus had probable cause to believe that the card was false. *Pringle*, 540 US at 371; *Champion*, 452 Mich at 115. This Court has approved the "police team" approach of combining officers' collective perceptions to support an arrest. *People v Dixon*, 392 Mich 691, 696–698; 222 NW2d 749 (1974) (holding that the collective perceptions of officers working on a case may be combined to satisfy the presence requirement for a misdemeanor arrest). *See also United States v Perkins*, 994 F2d 1184, 1188–1189 (CA 6, 1993) (reiterating prior holdings that probable cause for arrest may emanate from collective police knowledge).

Moreover, Sgt. Jennings inevitably would have learned of the results of his colleagues' LEIN checks before he released Defendant because Deputy Thomas would have had to return the identification card to Sgt. Jennings after running the check. Thus, Sgt. Jennings would have had evidence to support a conclusion that there was probable cause to arrest Defendant before any search of Defendant's person occurred, even if neither Finn's positive alert on Defendant's bag

[19] MCL 28.295(3) prohibits the possession of an altered, counterfeited, forged, or duplicated state identification card and punishes those actions as a 1-year misdemeanor.

nor Defendant's admission to smoking marijuana supported such a conclusion. *See*, *e.g.*, *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984) (holding that, even if a Fourth Amendment violation occurs, evidence should not be suppressed "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[.]"); *People v Stevens (After Remand)*, 460 Mich 626, 636; 597 NW2d 53 (1999) (holding that Michigan recognizes the inevitable discovery exception to the exclusionary rule).

Ultimately, regardless of the exact odor Finn alerted on, his alert alone provided probable cause to arrest Defendant on the spot. *Royer*, 460 US at 505–506. Defendant's admission to smoking marijuana, which he made while legally detained for investigative purposes, only added to the conclusion that there was probable cause for his arrest. Likewise, the officers' discovery that Defendant had presented a false identification card also provided them with probable cause to arrest him. Thus, the totality of the circumstances shows that there was unquestionably probable cause to arrest Defendant. The absence of drugs in Defendant's bag only increased the probability that they were on his person. *Pringle*, 540 US at 371; *Champion*, 452 Mich at 115. Probable cause to arrest Defendant therefore existed well *before* he was searched. The Court of Appeals again correctly concluded that the circuit court did not properly apply the pertinent constitutional standards to the facts of the case and, accordingly, reversed. This was not error.

E. Because the officer developed probable cause to arrest Defendant while Defendant was lawfully detained for investigative purposes, he was lawfully allowed to conduct a search incident to arrest. Such a search may precede a formal arrest if probable cause to arrest already exists at the time of the search.

Finally, because Sgt. Jennings clearly had probable cause to arrest Defendant, he likewise had the ability to search Defendant incident to arrest. The search incident to arrest exception to

the warrant requirement "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). *See also Chimel v California*, 395 US 752, 762–763; 89 S Ct 2034; 23 L Ed 2d 685 (1969) (explaining that the search incident to arrest exception is based on the belief that it is reasonable for a police officer to expect an arrestee to use any weapons he may have or to attempt to destroy incriminating evidence). For searches incident to arrest, the police may search the arrestee and the area within his immediate control as well as containers seized from the arrestee. *Gant*, 556 US at 339; *Chimel*, 395 US at 762–763; *United States v Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973). A search of a person incident to an arrest requires no additional justification. *Champion*, 452 Mich at 115.

In *Rawlings v Kentucky*, 448 US 98; 100 S Ct 2556; 65 L Ed 2d 633 (1980), the Supreme Court held that a search incident to arrest need not necessarily follow the arrest, so long as probable cause to arrest existed before the search. In *Rawlings*, the defendant moved in the trial court to suppress certain evidence seized by law enforcement before he was formally arrested, including money and a knife that the arresting officer located on his person after he claimed ownership of some controlled substances. *Id.* at 100–102. The trial court denied the motion, finding that "the search that revealed the money and the knife was permissible 'under the exigencies of the situation,'" and the defendant was convicted. *Id.* at 102. The Kentucky Court of Appeals affirmed, holding that the detention of the five individuals in the house and the subsequent searches were legitimate "because the police had probable cause to arrest all five people in the house when they smelled the marihuana smoke and saw the marihuana seeds." *Id.* at 103. The Supreme Court of Kentucky also affirmed, but under a different rationale. *Id.* That court held that "the search uncovering the money in [Rawlings'] pocket, which search followed

[his] admission that he owned the drugs in Cox's purse, was justifiable as incident to a lawful arrest based on probable cause." *Id.*

The United States Supreme Court granted certiorari and affirmed. *Id.* at 100. Rawlings argued that he had a reasonable expectation of privacy in Cox's purse in order to challenge the legality of the search; that his admission to owning the drugs was the fruit of an illegal detention; and that the search that uncovered the money and the knife was illegal itself. *Id.* at 103. As to the third issue, the *Rawlings* Court dismissed the challenge out of hand, concluding that:

> Petitioner also contends that the search of his person that uncovered the money and the knife was illegal. Like the Supreme Court of Kentucky, we have no difficulty upholding this search as incident to petitioner's formal arrest. Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. ***Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.*** [*Id.* at 110–111 (citations omitted).]

In a footnote, the Court also observed that "[t]he fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner." *Id.* at 111, n 6.

This Court also has expressly held that a warrantless search of an individual whom the police have probable cause to arrest is proper, even when the person has not yet been formally arrested. In *Arterberry*, 431 Mich at 381, the Detroit Police Department, acting with an informant, purchased heroin at a suspected drug distribution site and observed seven people make short visits to the site on the same day in a thirty-minute period. *Id.* at 382. A warrant was issued the following day to search the residence and the man who sold the heroin. *Id.* When the officers knocked on the door and announced their presence, they heard someone running away and forced the door open. *Id.* at 382–383. Seven people were found inside, and all of them were subjected to a weapons pat-down. *Id.* at 383. The police searched the site and discovered a locked toolbox, which they forced open. *Id.* Inside, they discovered "a quantity of controlled

substances." *Id.* The occupants were searched for the key to the box, and it was discovered in Arterberry's possession. *Id.* The six other individuals "were apparently released." *Id.* Arterberry was charged with possession with intent to deliver controlled substances, but the district judge dismissed the charges at his preliminary examination. *Id.* The district judge found that the search of Arterberry's person exceeded the scope of the warrant. *Id.*

Both the Detroit Recorder's Court and the Court of Appeals affirmed. *Id.* This Court unanimously reversed, finding that the officers acted within the scope of the warrant when they opened the toolbox and thus gained probable cause to arrest all seven occupants "for loitering in a place of illegal occupation or business. The police could have reasonably believed that the seven occupants of this private residence knew that the residence was being operated as a site for the distribution of controlled substances." *Id.* The Court noted that the officers did *not* assert "and may not have had in mind the offense of loitering in a place of illegal occupation or business" when they searched the occupants, but the state of mind of the officers was irrelevant. *Id.* at 384. Ultimately, this Court held:

> Since the officers had probable cause to arrest Arterberry and the other occupants, the search was proper: had the occupants been arrested, they could have then been searched incident to arrest. The validity of the search is not negated by the failure of the officers to arrest the occupants. Where the officers have probable cause to arrest a group of persons and, instead of arresting them all, search them and then arrest only some of the group, they act properly. Those searched could have been arrested and then searched incident to the arrest. [*Id*.]

The *Arterberry* Court also quoted approvingly, *id*. at 384–385, from the second Justice Harlan's concurring opinion in *Peters v New York*, 392 US 40, 77; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (HARLAN, J, concurring), which states that:

> If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he

> seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards." [Emphasis original.]

Likewise, in *Champion*, 452 Mich at 92, this Court cited both *Rawlings* and its own prior opinion in *Arterberry* for the proposition that a search conducted immediately prior to a suspect's arrest may be justified as incident to that arrest if the police already have probable cause to arrest that suspect *before* conducting the search.[20] *Champion*, 452 Mich at 115–116. The search in *Champion* involved a pill bottle found in Champion's sweatpants that was opened after the police already had probable cause to arrest him. *Id.* at 117. The *Champion* Court noted only as a word of caution that "a search . . . cannot be justified as being incident to an arrest if probable cause for the contemporaneous arrest was provided by the fruits of the search." *Id.* at 116–117.

In this case, when viewed objectively, the totality of the circumstances shows that the police developed probable cause to arrest Defendant while he was lawfully detained for investigative purposes when the drug-sniffing dog, Finn, alerted on Defendant's bag. *See* Parts I.B, I.C, and I.D. Defendant also admitted to smoking marijuana earlier in the day and presented

[20] A number of other states' appellate courts have offered similar holdings. *See, e.g.*, *AT v State*, 941 So 2d 478, 479 (Fla App, 2006) ("A search incident to an arrest may precede the formal arrest as long as probable cause existed prior to the search."); *Easley v State*, 166 Ind App 316, 319; 335 NE2d 838 (1975) ("[A] search incident to an arrest is not rendered invalid merely because it precedes a formal arrest or notice of arrest where probable cause for the arrest exists prior to the search."); *Commonwealth v Jackson*, 464 Mass 758, 761; 985 NE2d 853 (2013) ("The legality of the search [incident to arrest] depends on the legality of the arrest, although 'the search may precede the formal arrest so long as probable cause [to arrest] exists independent of the results of the search,' and the arrest and search are 'roughly contemporaneous.'"), quoting *Commonwealth v Washington*, 449 Mass 476, 481; 869 NE2d 605 (2007); *Joyce v Commonwealth*, 56 Va App 646, 657–658; 696 SE2d 237 (2010) ("A constitutionally permissible search incident to arrest 'may be conducted by an officer *either before or after* the arrest.' It does not matter whether the search occurs 'at the moment the arresting officer takes the suspect into custody or when he announces that the suspect is under arrest'" if probable cause exists independently of what the search produces), quoting *Italiano v Commonwealth*, 214 Va 334, 336; 200 SE2d 526, 528 (1973) (internal citations omitted). Our Court of Appeals has done so as well. *See, e.g.*, *People v Solomon (Amended Opinion)*, 220 Mich App 527, 530; 560 NW2d 651 (1996) (noting that the search incident to arrest exception applies when there is probable cause to arrest, "even if an arrest is not made at the time the search is actually conducted).

a false identification card to the officers. (E, 6–9, 26, 29–30, 34, 36.) Viewing all of these facts objectively, *Scott*, 436 US at 138, it is clear that there was probable cause to arrest Defendant after these events occurred. *Pringle*, 540 US at 371; *Champion*, 452 Mich at 115. Thus, under the substantial and longstanding case law of the United States Supreme Court, this Court, and the Court of Appeals, the subsequent search of Defendant's person that revealed a bag containing 67.9 grams of heroin was justified as a search incident to arrest where Sgt. Jennings already had ample probable cause to arrest Defendant. *Rawlings*, 448 US at 110–111; *Peters*, 392 US at 77 (HARLAN, J, concurring); *Champion*, 452 Mich at 115–116; *Arterberry*, 431 Mich at 384–385; *Solomon*, 220 Mich App at 530.

The circuit court reversibly erred when it concluded that the search was improper. This error clearly stemmed from the circuit court's mistaken characterization of the initial detention as improper when it was a proper *Terry* investigative stop, as previously discussed. During the brief investigation, Sgt. Jennings quickly developed probable cause to arrest Defendant based on Finn's alert on Defendant's luggage and, further, on Defendant's admission to smoking marijuana and presentation of a false identification card.[21] While the search of Defendant preceded his formal arrest, it was a proper search incident to that arrest, just as the United States Supreme Court, this Court, the Court of Appeals, and numerous other courts have held. Viewed objectively and considering the totality of the circumstances, Sgt. Jennings' actions were entirely reasonable. *Gates*, 462 US at 238; *Arterberry*, 431 Mich at 384. The circuit court reversibly erred when it suppressed the evidence and then dismissed the case against Defendant. The Court of Appeals thereafter correctly concluded that the circuit court did not properly apply the pertinent constitutional standards to the facts of the case and reversed. This also was not error.

[21] Again, those actions are punishable under MCL 333.7403(2)(d) and MCL 28.295(3), respectively.

F. Conclusion.

"[T]he touchstone of the Fourth Amendment is reasonableness." *Williams*, 472 Mich at 314, quoting *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996) (citations and internal quotation marks omitted). The actions taken by Sgt. Jennings and his colleagues in this case were eminently reasonable in view of the totality of the circumstances presented at the Pontiac bus station on July 12, 2012. *Arvizu*, 534 US at 274–275; *Nelson*, 443 Mich at 632. Defendant was briefly, lawfully detained for investigative purposes after arriving at the bus station in the same car as Leroy Jackson, a suspected heroin trafficker whose movements had been accurately predicted by a tip to the Crime Stoppers hotline. The bus station was known to the police as a location used for travel by narcotics traffickers, who commonly traveled in pairs. Sgt. Jennings initially approached Defendant, spoke to him, and asked for his identification while Jackson was arrested. Defendant said that he and Jackson were traveling up north. He was then detained for investigative purposes and handcuffed for safety reasons after he began acting nervously. The officers diligently investigated their suspicions; the entire encounter took about ten minutes. A drug-sniffing dog *that was already on-scene* then alerted on Defendant's bag in the bus station. Defendant admitted that he had smoked marijuana. Other officers had already found that his identification card was false. In light of these developments, the reasonable suspicion to stop Defendant escalated to probable cause for his arrest. The search that then uncovered a 67-gram bag of heroin in Defendant's pants was a proper search incident to arrest.

The Court of Appeals did not err by reversing the circuit court's suppression and dismissal orders because the circuit court failed to apply the appropriate constitutional standards to the essentially uncontested facts of this case. *Williams*, 472 Mich at 313. Accordingly, this Court should deny Defendant's application for leave to appeal.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Joshua J. Miller, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant's application for leave to appeal.

Respectfully submitted,

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